Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

No. 77-1295

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

EDWARD F. BURKE,
Petitioner

v.

THE NARRAGANSETT ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF RHODE ISLAND

BRIEF IN OPPOSITION

SAMUEL HUNTINGTON,
CAROL K. DIETZ,
20 Turnpike Road,
Westborough, Massachusetts 01581
Attorneys for Respondent

PRESS OF GEORGE H. DEAN CO., BOSTON

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Question presented	2
Statement	3
Argument	9
Conclusion	15

CITATIONS

CASES:

Federal Power Commission v. *Southern California Edison Co.*, 376 U.S. 205	12
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246	10
Re New England Electric System, 38 S.E.C. 193	4
New England Power Company, Order Denying Motions to Reject, Accepting Proposed Tariff Sheets for Filing, etc., F.P.C., December 31, 1975	5-6
Panhandle Eastern Pipe Line Co. v. *Public Service Commission*, 332 U.S. 507	14
Public Utilities Commission v. *Attleboro Steam & Electric Co.*, 273 U.S. 83	12
Ray v. *Atlantic Richfield Co.*, 46 U.S. Law Week 4200	15
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218	15
Securities and Exchange Commission v. *New England Electric System*, 384 U.S. 176	4
United Gas Corp. v. *Mississippi Public Service Commission*, 240 Miss. 405, 127 So. 2d 404	8, 9
Western Distributing Co. v. *Public Service Commission*, 285 U.S. 119	11, 12, 13

	Page
STATUTES AND CONSTITUTIONAL PROVISION:	
Federal Power Act, 16 U.S.C. 824, *et seq.*	passim
Section 205, 16 U.S.C. 824d	2, 3, 9-10, 13
Section 206(a), 16 U.S.C. 824(a)	2, 9, 13
Section 308(a), 16 U.S.C. 825g(a)	2, 11
Public Utility Holding Company Act of 1935, 15 U.S.C. 79, *et seq.*	4, 13
Section 2(a)(20), 15 U.S.C. 79b(a)(20)	13
Section 13, 15 U.S.C. 79m	13
General Laws of Rhode Island	
Section 39-3-30	2, 8
Section 39-3-32	2
United States Constitution	
Commerce Clause, Article 1, § 8	12
MISCELLANEOUS:	
Hearings before House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Session on H. R. 5423	13-14
S. Rep. No. 621, 74th Cong., 1st Session	12, 13, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1295

EDWARD F. BURKE,
Petitioner

v.

THE NARRAGANSETT ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF RHODE ISLAND

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court (Pet. App. 1a-12a) is reported at 381 A.2d 1358. The decision and order of the Rhode Island Public Utilities Commission (Pet. App. 13a-33a) is reported at 17 P.U.R. 4th 164.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on December 30, 1977. The petition for a writ of certiorari was filed on March 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

Sections 201 and 205 of the Federal Power Act, 16 U.S.C. §§ 824, 824d, and Sections 39-3-30 and 39-3-32 of the Rhode Island General Laws are set forth at Pet. App. 48a-52a and 55a-56a. Section 206(a) of the Federal Power Act, 16 U.S.C. § 824e(a), provides:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

Section 308(a), 16 U.S.C. 825g(a), provides:

> "Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceedings before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest."

QUESTION PRESENTED

Whether, in a retail rate proceeding limited to the question of an electric utility's cost of purchasing power from its interstate wholesale affiliate, a state public utilities commission has jurisdiction to inquire into the reasonableness

of the costs of the affiliate underlying the wholesale electric rates when the affiliate and its wholesale rates are subject to the plenary authority of the Federal Energy Regulatory Commission[1] under the Federal Power Act, 16 U.S.C. §§ 824, *et seq.*

STATEMENT

This case involves an investigation by the Rhode Island Public Utilities Commission (the "PUC") of the reasonableness of the costs underlying the wholesale electric rate charged respondent, The Narragansett Electric Company ("Narragansett"), by its affiliate New England Power Company ("New England Power"). The proceeding before the PUC was limited to the question whether Narragansett should be permitted to adjust its retail rates to reflect increased purchased power costs under a wholesale rate filed by New England Power and allowed to become effective subject to refund by the Federal Power Commission (now the Federal Energy Regulatory Commission, see note 1, *supra*) pending a full investigation under Section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e).

Despite the pending full investigation by the Federal Power Commission, the PUC heard extensive evidence and made specific findings on the reasonableness of New England Power's costs underlying its wholesale rates — the very issue before the Federal Power Commission. As a result, Narragansett was only permitted to adjust its retail rates to recover a portion of its increased purchased power

---

[1] The functions of the Federal Power Commission under the Federal Power Act were recently transferred to the Federal Energy Regulatory Commission within the newly created Department of Energy. Department of Energy Organization Act, P.L. 95-91, § 402, 42 U.S.C. § 7172. The substantive provisions of the Federal Power Act were not amended by the transfer.

costs (Pet. App. 32a). On appeal, the Rhode Island Supreme Court reversed, holding that "jurisdiction to determine the reasonableness of the wholesale rate charged by [New England Power] to Narragansett rests exclusively with the FPC" under the Federal Power Act, 16 U.S.C. §§ 824 *et seq.* (Pet. App. 6a).

A. *Background*

Both Narragansett and New England Power are subsidiaries of New England Electric System ("NEES"), a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79, *et seq.* NEES and its electric operating companies form an "integrated public-utility system" (the "NEES System"),[2] with New England Power providing the generation and transmission for the distribution subsidiaries — Narragansett,[3] Massachusetts Electric Company and Granite State Electric Company. The distribution companies serve retail customers in Rhode Island, Massachusetts and New Hampshire, respectively. Narragansett purchases nearly all its power requirements from New England Power.

The NEES System structure parallels the jurisdictional division between the Federal Energy Regulatory Commission and the state regulatory commissions: the rates at which New England Power sells power at wholesale to the

[2] The Securities and Exchange Commission has ruled that the electric utility subsidiaries of NEES constitute an "integrated public utility system" within the meaning of the Public Utility Holding Company Act. *Re New England Electric System*, 38 S.E.C. 193, 199-200 (1958). See *Securities and Exchange Commission* v. *New England Electric System*, 384 U.S. 176, 177-78 (1966).

[3] Narragansett owns certain limited generation and transmission facilities which are controlled by New England Power under an integrated facilities contract.

distribution subsidiaries are regulated by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C. §§ 824 *et seq.*, whereas the retail rates of the three distribution subsidiaries are regulated by the respective state regulatory commissions. Thus, increased generation and transmission costs cannot be recovered from the System's ultimate customers until both the Federal Energy Regulatory Commission permits increased wholesale rates to go into effect and the state regulatory commissions permit the distribution companies to recover their resulting increased purchased power costs through increased retail rates. It is a matter of critical importance to the financial stability of the System that the pass through of increased purchased power costs not be subjected to undue regulatory lag.

In order to expedite the reflection of increased wholesale rates in its retail rates, Narragansett sought and obtained approval from the PUC in 1972 of a purchased power cost adjustment clause as part of its retail rate tariffs. This clause, which is still in effect, provides that Narragansett's rates are subject to adjustment for changes in Narragansett's wholesale cost of purchased power as reflected by New England Power's wholesale rates "as from time to time on file and effective with the Federal Power Commission".

B. *Proceedings Before the PUC*

In November 1975, New England Power filed a new wholesale rate ("Rate R-10") with the Federal Power Commission to take effect January 1, 1976, to reflect increased costs in providing wholesale electric service. The Commission accepted the rate for filing, suspended its effectiveness for two months until March 1, 1976, at which time the rate would take effect subject to refund, and initiated a full

investigation and hearings on the justness and reasonableness of the proposed rate (Pet. App. 34a-47a). On March 1, 1976, Rate R-10 became effective and New England Power began charging Narragansett at the increased rate for electric power purchased at wholesale by Narragansett.

On December 1, 1975, Narragansett filed with the PUC a notice of adjustment of its retail rates pursuant to the purchased power cost adjustment clause to reflect its increased costs of purchased power under Rate R-10. The adjustment was to be subject to refund in the event Rate R-10 were subsequently reduced. The PUC suspended the effective date of the proposed adjustment pending an investigation. At a hearing before the PUC in March 1976, Narragansett presented testimony on the amount of the increase in its purchased power costs under Rate R-10 and the need for an adjustment to its retail rates and rested its case.

No further hearings were held until August 16, 1976, by which time the PUC had announced its intention to investigate New England Power's costs underlying Rate R-10. At the August 16 hearing, Narragansett moved that the purchased power cost adjustment to its retail rates be put into effect immediately. The PUC denied the motion and ruled that "it has clear jurisdiction and authority as well as the obligation under Rhode Island statutes to investigate the costs which relate to and which underly [sic] the proposed purchased power cost adjustment" (Tr., Aug. 17, 1976, p. 3).

While fully reserving its right to challenge in subsequent judicial proceedings the Commission's jurisdiction, Narragansett presented the testimony and exhibits of certain witnesses prepared in connection with New England Power's Rate R-10 case before the Federal Power Commission and made the witnesses available for cross-examination. In addition, the Rhode Island Division of Public Utilities and

Carriers presented witnesses on New England Power's cost of capital and certain cost of service issues. The PUC thus considered the very same testimony and issues concerning New England Power's costs that were the subject of the Federal Power Commission's investigation of Rate R-10.[4]

Finally, on December 1, 1976, the PUC issued its final decision and order. It specifically rejected Narragansett's claim that the PUC was barred from investigating the costs underlying New England Power's Rate R-10 by the Federal Power Act. Based on its evaluation of the reasonableness of specific costs underlying New England Power's Rate R-10, the PUC determined that Narragansett was entitled to recover only approximately $5,300,000 of the $9,300,000 annual increased purchased power expense incurred by Narragansett under Rate R-10. Narragansett was ordered to place into effect a purchased power cost adjustment reflecting the lower amount (Pet. App. 13a-33a).

The record before the PUC firmly establishes the devastating impact on Narragansett of its inability to recover through its retail rates the full amount of its payments to New England Power for purchased power. From March 1, 1976, when Rate R-10 became effective, through December 1, 1976, when the PUC issued its decision, Narragansett was forced to absorb an estimated $7,054,000 of increased purchased power expense, or on average more than $780,000 per month. In large part due to this inability to recover a legitimate expense, it was estimated that Narragansett would incur a loss on its intrastate operations regulated by the PUC of $900,000 for the 12 months ending November 30,

---

[4] Extensive hearings were concluded in New England Power's R-10 case in March 1977 and an Initial Decision was issued by the Administrative Law Judge in June 1977. All parties excepted to portions of the Initial Decision, and the case is now awaiting final decision by the full Federal Energy Regulatory Commission.

1976.[5] Narragansett continues to be unable to recover a very significant portion of its increased purchased power expense.

C. *The Decision Below*

On appeal, the Rhode Island Supreme Court reversed and remanded, holding unanimously that the PUC lacks jurisdiction to inquire into the reasonableness of the wholesale rate charged to Narragansett by New England Power since Congress had delegated exclusive regulatory authority over such rate to the Federal Power Commission under the Federal Power Act (Pet. App. 5a-6a).

The court emphasized that it was not interferring with the PUC's basic authority over retail rates; the PUC need not permit an increase in Narragansett's retail rates to reflect the increased purchased power cost if Narragansett has experienced savings in other areas of its operations (Pet. App. 9a). Nor did the court deny the PUC's authority under § 39-3-30 of the Rhode Island General Laws to investigate transactions among affiliates; it simply ruled that Narragansett had met its burden of proof with respect to its purchases from New England Power by establishing that such purchases were at the rate filed with and permitted to take effect by the Federal Power Commission — the only legal rate New England Power could charge. The court agreed with a decision of the Mississippi Supreme Court reaching the same conclusion in a case presenting precisely the same issue. *United Gas Corp.* v. *Mississippi Public Service Commission,* 240 Miss. 405, 442-43; 127 So. 2d 404, 420 (1961) (Pet. App. 7a-8a).

[5] The record includes an affidavit submitted by Narragansett to the Rhode Island Supreme Court in May 1977 showing that Narragansett sustained a loss of $1,295,000 on its intrastate operations for the calendar year 1976, and that the loss continued to grow through February 1977.

ARGUMENT

The decision below is correct and, contrary to petitioner's assertion (Pet. 8-17), presents no conflict with prior decisions of this Court. The court below correctly perceived that the Federal Power Act vests the Federal Energy Regulatory Commission (successor to the Federal Power Commission) with exclusive authority over wholesale electric rates and their underlying costs, while preserving the basic authority of state commissions over retail rates. Petitioner's argument that state commissions should be free to duplicate the investigatory and adjudicatory functions of the Federal Energy Regulatory Commission by inquiring into the reasonableness of costs underlying wholesale rates is based upon a superficial and faulty reading of the Federal Power Act and its legislative history. Since the decision below is correct and is consistent with the decision of the only other court to consider the issue in the 43 years since the enactment of the Federal Power Act, *United Gas Corp.* v. *Mississippi Public Service Commission,* 240 Miss. 405, 442-43; 127 So. 2d 404, 420 (1961), there is no occasion for plenary review by this Court.

1. In 1935, Congress enacted Part II of the Federal Power Act, 16 U.S.C. §§ 824 *et. seq.,* to bring interstate wholesale sales of electricity under effective federal regulation. Under Sections 205 and 206 of the Act, Congress vested in the Federal Power Commission pervasive authority to investigate and adjudicate the reasonableness of interstate wholesale rates. Carefully balancing consumer and investor interests, Congress in Section 205(e) provided

for the suspension of new wholesale rate filings for up to five months pending investigation by the Commission; if the investigation is not completed at the end of the suspension period, the filed rates become effective subject to the Commission's power to order refunds at the conclusion of its investigation.

Fundamental to the above statutory scheme is the principle that no wholesale rate may be charged by an electric utility other than the rate on file with the Commission and in effect. As this Court has observed with respect to the Federal Power Act (*Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951):

> "[A wholesale customer] can claim no rate as a legal right that is other than the filed rate, *whether fixed or merely accepted by the Commission,* and not even a court can authorize commerce in the commodity on other terms" (emphasis added).

New England Power's wholesale sales to Narragansett are in interstate commerce and thus are subject to the plenary rate authority of the Federal Energy Regulatory Commission. Once Rate R-10 was accepted for filing and permitted to take effect by the Commission, it was the only legal rate New England Power could charge Narragansett. Neither a court nor a state regulatory commission has authority to establish a different rate.

In addition to lacking jurisdiction to challenge the wholesale Rate R-10 directly, the PUC has no jurisdiction to examine the reasonableness of New England Power's costs underlying Rate R-10 in reviewing Narragansett's retail rates. The Federal Power Act not only gives the Federal Energy Regulatory Commission exclusive jurisdiction over Rate R-10 itself, but as a logical corollary also establishes the Commission as the sole arbiter of the reasonableness of

New England Power's underlying costs. If petitioner's argument in this case were sustained, the PUC would have authority to investigate precisely the same issues — cost issues going to the reasonableness of New England Power's wholesale electric rates — entrusted to the Federal Energy Regulatory Commission. Such duplicative regulation would be totally inconsistent with the statutory scheme embodied in the Federal Power Act.

In enacting the Federal Power Act, Congress did not overlook the interests of state commissions in assuring that utilities subject to their jurisdictions pay only reasonable rates for power purchased at wholesale. Section 308(a) of the Act expressly provides for the intervention of states, state commissions and consumer representatives in wholesale rate hearings before the Federal Energy Regulatory Commission. Both petitioner and the Rhode Island Consumers' Council intervened and fully participated in New England Power's Rate R-10 case, currently awaiting final decision by the full Federal Energy Regulatory Commission.

2. Petitioner asserts that the decision below is in direct conflict with prior decisions of this Court. Primary reliance is placed on this Court's pre-Federal Power Act decision in *Western Distributing Co.* v. *Public Service Commission,* 285 U.S. 119 (1932), holding that a state commission is not constitutionally barred in retail rate proceedings from examining the costs underlying the wholesale rates of affiliates. Citing highly selective statements in the legislative history of the Federal Power Act, petitioner then argues that Congress in enacting the Federal Power Act divided state and federal regulatory authority along precise constitutional lines in strict accord with all of this Court's prior rulings. It is petitioner's argument, rather than the decision below, which is in direct conflict with decisions of this Court.

The Federal Power Act was in large measure passed in response to a series of this Court's decisions, culminating in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), holding that state regulatory commissions are barred by the Commerce Clause of the United States Constitution from regulating wholesale sales of electric energy in interstate commerce.[6] In enacting the Federal Power Act, Congress filled the "Attleboro gap" by bringing wholesale sales of electricity under comprehensive, effective regulation. As this Court has noted, Congress did not limit federal jurisdiction to those matters beyond the constitutional power of the states to regulate, but instead undertook "to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary [a] case-by-case analysis." *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964).

The "bright line" drawn by Congress left intact the basic authority of the states over retail rates; the states, not the federal government, are to fix local rates. S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935). Congress' preservation of basic state authority over retail rates, however, did not include preservation of the very limited state authority recognized in *Western Distributing* to inquire into costs underlying interstate wholesale transactions between affiliates not otherwise subject to competition or regulation. A determination of the reasonableness of such costs is an integral part of an adjudication of wholesale, not retail, rates. By granting the Federal Power Commission plenary authority over interstate wholesale electric rates, Congress brought wholesale transactions among affiliates under effective federal control and thereby completely removed the basis for state scrutiny of those matters.

---

[6] For a comprehensive analysis of the legislative history of the Federal Power Act, see *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 212-16 (1964).

3. An examination of the entire regulatory scheme enacted in 1935 confirms Congress' intent to subject wholesale electric transactions among affiliates to exclusive federal regulation. Part II of the Federal Power Act was enacted together with the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.*, as a single, coordinated piece of legislation to bring both interstate sales of electric energy at wholesale and electric utility holding companies under effective regulation. Public Utility Act, Pub. L. No. 74-333; 49 Stat. 803 (1935). The Holding Company Act expressly sanctions the continued existence of holding companies, recognizing the economies of management and integration of related facilities made possible by properly restricted holding companies. Congress was also deeply concerned with the potential for self-dealing within holding company systems, however, and provided in Section 13 of the Act for the regulation of transactions between affiliates by the Securities and Exchange Commission. Expressly excluded from the coverage of Section 13, however, are wholesale sales of electric energy between affiliates. Section 2(a)(20). Since such wholesale sales were simultaneously subjected to plenary rate regulation by the Federal Power Commission under Sections 205 and 206 of the Federal Power Act, the inference is compelling that Congress intended that Commission to be the exclusive arbiter of the reasonableness of interstate wholesale transactions between different electric subsidiaries of the same holding company.

The legislative history of the 1935 federal legislation confirms the above conclusion. Congress focused sharply on the absence of arms' length bargaining in transactions between members of the same holding company system and the practical inability of the states to regulate such transactions. *E.g.*, S. Rep. No. 621, *supra*, pp. 36, 56. State authority over such transactions under the *Western Distributing* decision, *supra*, was referred to as "purely theo-

retical" in view of the difficulty facing a state agency attempting to determine the costs of affiliates located in two or more states. Hearings on H.R. 5423 before House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 761 (1935). In enacting the Federal Power Act, Congress explicitly recognized the relationship between the control of holding companies and the regulation of the interstate electric power business (S. Rep. No. 621, *supra*, pp. 17-18); accordingly, it undertook not only to fill the "Attleboro gap", but also to bring one aspect of intercompany dealing — wholesale sales of electricity — under effective federal regulatory control.[7]

4. The decision below avoids duplicative administrative proceedings which would force utilities to justify the same costs before two different regulatory agencies and would greatly increase regulatory lag. While Congress sought in 1935 to fill the gaps in regulation, it did not create a system envisioning simultaneous regulation by federal and state agencies of costs underlying wholesale transactions; federal regulation alone of these costs was deemed sufficient effectively to protect consumers' interests.[8] In subjecting

[7] While petitioner relies on statements in the committee reports to the effect that Congress did not intend to usurp state regulatory authority, petitioner fails to cite the Senate Commerce Committee's statement emphasizing that the purpose of the Federal Power Act was to impose federal regulation over those matters "which cannot *effectively* be controlled by the States" (emphasis added). S. Rep. No. 621, *supra*, p. 18.

[8] As this Court has noted with respect to legislation containing parallel rate provisions (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332, U.S. 507, 520 (1947)):

> "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level."

wholesale rates and their underlying costs to comprehensive federal regulation, Congress preempted the states from regulating the same transactions. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947). As this Court recently ruled, where a "federal scheme . . . aims precisely at the same ends as does" a state regulation, the state regulation must fall. *Ray* v. *Atlantic Richfield Co.*, 46 U.S. Law Week, 4200, 4203 (U.S. 1978).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

SAMUEL HUNTINGTON,
CAROL K. DIETZ,
20 Turnpike Road,
Westborough, Massachusetts 01581
Attorneys for Respondent

March, 1978